court held children of nephews dead when the will was written were not entitled; yet no one could doubt that the testator intended to include them.

In *Cochran's Est.*, (1913), 10 Del. Ch. 134, 85 Atl. 1070, the court went so far as to impute such an intent to exclude grandchildren of the testator on the words "shall be dead", which certainly is equally and strictly true of those dead at the writing of the will. The words were "unto such of my children as may survive me, and if any of my said children shall be dead leaving a child or children, then to such child or children the share the parent would have taken if living." It is not possible to make children of a child dying before the testator substituted legatees under this will; for the persons in whose place they are supposed to take are "such of my children as may survive me." If the supposed original legatees survive the testator they themselves take. Those who do not survive the testator do not fall within the class at all, and therefore no one can stand in their stead.

A more rational interpretation was made in holding children of a brother who was dead when the will was written to take under the words: "to be divided equally between my brothers and sister of the full and half blood equally, but if any be then deceased such share to go to his or her children equally." *Anderson* v. *Wilson*, (1912), 155 Iowa 415, in which the decisions English and American are reviewed at considerable length.

Re Hickey, (1917), 1 Ch. D. 601, was a legacy to "the descendants of A or their descendants living at my death"; in which the court held that children of a descendant dead when the will was written were entitled to take.

While *Christopherson* v. *Naylor*, (1816), 1 Meriv. 319, is now too firmly established in England to be overruled there, and can only be distinguished to avoid its operation (*Musther, in re*, (1890), 43 Ch. D. 569, C. A.); courts here cannot consistently follow it after holding that the statutes declaring that legacies to descendants "who *shall die* before the testator shall be paid to their issue if any," entitle issue of members of a class dying before the will was made. See *Chenault* v. *Chenault*, (1888), 88 Ky. 83; *Bray* v. *Pullen*, (1892), 84 Me. 185; *Jamison* v. *Hay*, (1870), 46 Mo. 546. J. R. R.

ACQUIREMENT OF TITLE BY A WILLFUL TRESPASSER AND COMPENSATION FOR THE TRESPASSEE.—The interaction of the basic maxim of substantive law, that no man may be deprived of his property without his consent, and the correlative maxim of adjective law, that the courts will give exact compensation for property taken or destroyed, together with the more or less mechanical rules of damages depending upon the form of action used, have in their outcome gone far toward justifying the somewhat grandiloquent utterance of our legal forbears of the seventeenth and eighteenth centuries, that the "Common Law is the perfection of human wisdom." The final stage in this development is shown in the late cases of *Polk County* v. *Parker*, (Iowa, Dec., 1916), 160 N. W. 320 and *Warren Stave Co.* v. *Hardy, et al.*, (Ark., Oct., 1917), 198 S. W. 99.

Since the decision in *Wetherbee* v. *Green* has domesticated the relative value rule in English law there has been much controversy and litigation over the ratio of disparity which will effect a transfer of title. The ratio

in this case was twenty-eight to one. Judge Cooley afterwards, in *Isle Royale Mining Co.* v. *Hertin,* (1877), 37 Mich. 332, said that a ratio of three to two was not sufficient. In *Eaton* v. *Langley,* (1898), 65 Ark. 448, a ratio of six to two was held inadequate, while in *Louis Werner Stave Co.* v. *Pickerif,* (1909), 55 Tex. C. A. 632, a ratio of three to one did effect a transfer of title. We may conclude from this that the disparity must be so great that it will "shock the conscience of the court" to apply the old common law rule for the protection of the original holder of title, though the exact point at which this will occur seems not very well determined.

When the bulwark of title yields for the benefit of the innocent trespasser, it does not leave the original holder of title without a remedy. He is to be made whole by adequate compensation for what he has lost and, in case the thing converted has increased in value for any reason, the amount of compensation is affected by the form of action that may be used in the suit for recovery. If trover or trespass is used, the recovery should logically be the value at the time and place of conversion. If detinue or replevin is used with the alternative recovery in damages, the amount should be the value at the time of the suit. In case the property appropriated has not been increased in value enough to effect a change of title and the suit is brought under the formless action of the code, these several conflicting principles are reconciled by allowing an inadvertent trespasser to keep all that has been added to the finished product by his own efforts, while the trespassee gets back the value of his title at the time of the conversion plus any increment of the market, if such there be. *Eaton* v. *Langley,* (1898), 65 Ark. 448. It is to the credit of the courts in some of our non-code states that the same equitable result is reached whether the form of action be trover, as in *Winchester* v. *Craig,* (1876), 33 Mich. 205, or replevin, as in *Gustin* v. *Embury-Clark Lumber Co.,* (1906), 145 Mich. 101.

All of this equitable relaxation of strict maxims of law and rules of practice has, however, been made for the benefit of the inadvertent trespasser, but in the first of the instant cases there enters that *nefandissimus Germanus* of the Common Law, the willful trespasser. In *Polk County* v. *Parker, supra,* a city assessor took pages from a discarded county plat book and, outside of office hours, put on this paper valuable maps and plats. When he left the office he took away the book with the maps and plats. The county sued out a writ of replevin and secured possession of them. They were worth about $1,500. It was held that title had passed to the willful trespasser, thus answering in the affirmative the question that has been asked ever since the decision in *Wetherbee* v. *Green,* namely, will the rule in that case apply if the trespass is intentional, the very great disparity between the title converted and the labor and skill added being sufficient to "shock the conscience of the court into a decision favorable to the wicked trespasser? This, of course, reverses the acknowledged principle of the civil law, adopted in the case of *Silsbury* v. *M'Coon,* (1850), 3 Comst. (N. Y.) 379, that "a willful wrong doer acquires no property in the goods of another, either by the wrongful taking or by any change wrought in them by his labor or skill, however great the change may be." By a natural exten-

sion in the principle of this last mentioned case even the *bona fide* purchaser for value from the willful trespasser cannot convey what he himself does not have. *Wooden Ware Company* v. *United States,* (1882), 106 U. S. 432, represents the weight of authority on this point, though *Railway Co.* v. *Hutchins,* (1877), 32 Ohio St. 584, protests strongly against this on the ground that "the estoppel, so to call it, being created by fraud or wrong, exists only against the one guilty of that fraud or wrong, which the purchaser is not."

In the Arkansas case of *Warren Stave Co.* v. *Hardy, supra,* the facts bring before the court all of the conflicting principles rehearsed above. The agent of the appellant had bought stave bolts from one Jolly. Jolly had bought the standing oak timber out of which the bolts were made from one Turner, who claimed to own the land on which the timber was growing, but refused to tell how he got title thereto. Jolly had cut and removed the trees and sold the bolts to the appellant's agent. The title to the land on which the timber stood was not in Turner, as he claimed, but belonged to Hardy, the appellee. The standing timber was worth between $2.50 and $3 a cord. The stave bolts from $25 to $50 a cord, depending on the sort of staves for which they were used. It was *held,* that Jolly was a willful trespasser. As such he should, according to rule, acquire no right or interest in the timber, and the purchaser from him, though innocent, should acquire no greater right than the trespasser had. It was further *held* that the defendant was liable for the value of the stave bolts on the market less the charges of transportation, and not merely for the value of the logs before being worked up. Since the question of damages had arisen as an incident of the suit to quiet title to the land, the question of the transfer of title of the timber after its conversion into personalty did not come up, but the result of the decision is that while the injured party has received full compensation for his title, as though sold on the best market, the willful trespasser has acquired title to the chattel converted, when the ratio between the value of the chattel taken and the finished product is about ten to one, and has succeeded in transferring this right to the innocent purchaser who is allowed to keep this title on payment to the trespassee of the value of the chattel at the time of conversion, plus such a sum as may have been added to the converted property by any increment in the market for staves or from any "other causes independent of the acts of the defendant", cf. *Weymouth* v. *Chi and N. W. Ry. Co.,* (1863), 17 Wis. 572. Everybody has received his just dues, the various maxims of law act in unison and lawyers' law is in harmony with justice. J. H. D.

PUBLIC UTILITY VALUATION—GOING-CONCERN VALUE IN RATE MAKING.—What is the effect of a city ordinance which proposes to a public utility company the terms on which it may dispose of its product to the users, but which is rejected by the company? As to a company not yet doing business it is clear that the ordinance when rejected becomes a mere legal nullity. It never was more than an offer that might ripen into a binding contract by acceptance. That it is by no means a nullity as to a utility actually oper-